

DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CACR06-43

SEPTEMBER 20, 2006

BRANDON ROBINSON
APPELLANT

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, FIFTH
DIVISION, [NO. CR03-3542]

HON. WILLARD PROCTOR JR.,
JUDGE

V.

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Brandon Robinson appeals the revocation of his probation in the Pulaski County Circuit Court, raising one point. He contends that the court erred in granting the State's petition for revocation because the State did not introduce substantial evidence that his failure to pay probation-supervision fees was inexcusable. The State responds that it met its burden of proof by presenting evidence of non-payment, that Robinson then had the burden of providing a reasonable excuse, and that Robinson demonstrated an ability to pay although he had been declared an indigent. We affirm the order of revocation.

On January 12, 2004, Robinson pleaded guilty to two felony charges, possession of cocaine and possession of marijuana with intent to deliver. The trial court accepted the pleas and sentenced Robinson to concurrent sentences of four years' probation for each charge.

Among the conditions of Robinson's probation was the requirement that he pay a monthly fee of \$35 for probation supervision.

On June 23, 2004, the State filed a petition for revocation of Robinson's probation. At a hearing on July 20, 2004, the court found Robinson to be "current on fees now," noting that "the total amount that's due at this time is \$210 and the total amount paid is \$210."¹ At a subsequent hearing on August 19, 2004, the court was informed that Robinson again owed fees. Robinson told the court that he could pay the \$70 delinquency that day, and the court set a hearing for August 26. At the August 26 hearing, the court found that Robinson was current in paying his fees. The court set the next hearing for November 15, 2004, announcing that the case was being kept open until after Robinson faced new charges in a trial already set for November 11, 2004.

Robinson did not appear for the November 15 hearing, and an alias bench warrant was issued for his arrest. On November 16, 2004, the State filed a second petition for revocation. The petition alleged that Robinson had violated conditions of his probation, in part by failing to pay supervision fees. At a hearing conducted on March 24, 2005, the court was informed that Robinson owed \$210 in fees; he was given until May 23 to pay.

At the hearing on May 23, 2005, probation officer Lynette Brimley testified that Robinson was \$280 delinquent on his fees. The defense did not cross-examine Brimley about

¹The State points out that \$210 represents six months' fees and that the record does not indicate when payment was paid.

this testimony, nor did the defense put on a case of its own after the State rested. The court granted the petition to revoke probation at the conclusion of the hearing. Robinson was sentenced to the Arkansas Department of Correction for ten years on the charge of possession of marijuana with intent to deliver and to five years for possession of cocaine, the terms to be served consecutively. The trial court's ruling was entered by written order on June 17, 2005.

Where the alleged violation of the conditions of suspension or probation is a failure to make payments as ordered, the State has the burden of proving by a preponderance of the evidence that the failure to pay was inexcusable. *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988). However, once the State has introduced evidence of non-payment, the defendant has the burden of going forward with evidence of some reasonable excuse for his failure to pay. *Id.* To hold otherwise would place a burden upon the State which it could never meet—it would require the State, as part of its case in chief, to negate any possible excuses for nonpayment. *Id.* The trial court's findings of fact will be upheld on appeal unless they are clearly against a preponderance of the evidence. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004).

At the hearing on the second petition to revoke, the State introduced the testimony of Robinson's probation officer that Robinson was \$280 behind in paying supervision fees. Not only did he fail to go forward with evidence that his failure to pay was excusable, but the record demonstrates that at least twice before, under threat of imminent revocation, Robinson

had come up with the money to pay delinquent fees. It was incumbent on him at the hearing to go forward with evidence of a reasonable excuse for again failing to pay, but he did not do so. Accordingly, the trial court did not err in revoking his probation.

Affirmed.

BAKER and ROAF, JJ., agree.